STATE OF MICHIGAN

COURT OF APPEALS

LOLA MELBOURNE,

Plaintiff-Appellee,

v

LAWN WORKS,

Defendant,

and

WAYNE BOWLING AND RECREATION, INC.,

Defendant/Garnishee
Defendant-Appellant.

UNPUBLISHED
March 6, 2007

No. 263783
LC No. 00-010650-NO

LOLA MELBOURNE,

Plaintiff-Appellee,

v

WAYNE BOWLING AND RECREATION, INC.,

Defendant-Appellant.

No. 263819
LC No. 03-314738-CK

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals the trial court's ruling, following a bench trial, that plaintiff was entitled to recover from defendant on the basis of an indemnity provision in a contract between defendant Wayne Bowling and assignor Lawn Works. We affirm.

I. Facts and Procedural History

On December 3, 1996, Wayne Bowling entered into a written contract for snow removal services with Lawn Works.[1] The contract included this provision: "Customer agrees to defend and hold contractor harmless from any and all liability, including attorney fees, which the contractor may accrue resulting from the contractor's work on the customers [sic] property." The written contract expired on May 1, 1997. In the fall of 1997, Wayne Bowling and Lawn Works agreed orally to renew the contract for snow plowing for the 1997-1998 season. On January 15, 1998, plaintiff Lola Melbourne slipped and fell in the parking lot of Wayne Bowling.

Melbourne filed suit against Wayne Bowling on April 3, 2000. Wayne Bowling named Lawn Works as a non-party at fault, and on July 25, 2000, plaintiff amended her complaint to add Lawn Works as a defendant. Lawn Works, however, had ceased business operations in early 2000. The trial court entered an order on October 20, 2000, allowing alternate service of the complaint on Brian Shelton as Lawn Works.

Shelton failed to contact Wayne Bowling to claim his right to defense under the indemnity provision in the contract, to consult an attorney on his own, or to reply to the complaint in any way. On September 7, 2001, on plaintiff's motion, a default judgment was entered against Lawn Works in the amount of $646,400.[2]

Wayne Bowling, the remaining defendant, and Melbourne agreed to binding arbitration. An arbitration award was entered against Wayne Bowling on February 12, 2002, in the amount of $650,000. Wayne Bowling paid this award.

On October 29, 2002, plaintiff served a writ of garnishment on Wayne Bowling, claiming the right to garnish the contractual obligation to indemnify allegedly owed to Lawn Works by Wayne Bowling (Docket No. 263819). Wayne Bowling denied liability. While the garnishment action was proceeding, on January 28, 2003, plaintiff obtained an assignment from Thomas Scott, former partner of Shelton[3]; on April 23, 2003, plaintiff brought an action against Wayne Bowling as assignee of Scott for Lawn Works (Docket No. 263783).

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[1] On December 7, 1994, Lawn Works was created as a DBA by Brian Shelton and Thomas Scott. Scott withdrew from the business within a week, and Shelton continued as sole owner and operator. Only Shelton signed the Wayne Bowling contract for Lawn Works, identifying himself as "Owner."

[2] Plaintiff's injuries were such that she would be permanently unable to work and would require home care. Net income loss was calculated at $288,000. The cost of home care services was calculated at $218,400. Plaintiff's counsel requested an additional $400,000 in non-economic damages. The trial judge accepted the figure of $506,400 in total economic damages, and granted $150,000 in non-economic damages, for a total of $646,400.

[3] On January 12, 2004, plaintiff obtained an assignment from Shelton. However, plaintiff did not
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The trial court consolidated the two pending actions, and Wayne Bowling filed for summary disposition of the consolidated matter on December 17, 2003. Wayne Bowling alleged that plaintiff had no right to double recover, that there was no valid indemnity provision in the oral contract, that Lawn Works had failed to defend or tender the defense to Wayne Bowling, that Lawn Works was insolvent and had suffered no loss that obliged indemnification, and that as a matter of law, an indemnity contract cannot be enforced by garnishment. The trial court denied the motion in an opinion issued on May 11, 2004, rejecting all arguments as a matter of law except the claim that there was no enforceable indemnity provision in the contract for the second plowing season, reasoning that a question of fact remained as to the terms of the contract in force at the time of the slip and fall.

To address this question, a four-day bench trial was held on March 16, March 21, June 2, and June 8, 2005. The testimony of Kenneth Roth, general manager of Wayne Bowling, confirmed that Wayne Bowling had admitted the written contract controlled at the time of the accident. Plaintiff's counsel elicited from Roth the fact that in Wayne Bowling's Answer to Melbourne's First Amended Complaint, in response to the allegation that "Lawn Works, by contract, had a duty to salt and clear the area where Lola Melbourne slipped and fell," Wayne Bowling admitted that "Wayne Bowling and Lawn Works entered into a 'snow plowing contract' dated December 3, 1996."

The trial judge, as trier of fact, concluded:

> The dispute is whether or not the contract continued as written. But no matter how it's couched in terms of language, clearly to this Court, the intention of both Lawn Works and Mr. Shelton and Mr. Roth and Wayne Bowling was that the terms of the contract from December 3rd of 1996 continue as written.

The court found that "the provision of indemnification was in effect at the time of Ms. Melbourne's injury, and the Court finds in favor of the Plaintiff."

Defendant raises many issues on appeal, the two most important being the terms of the contract and the viability of double recovery in this case. We agree with the trial court as to both. Although we find these two issues dispositive of defendant's claims, so as to resolve all of the issues raised by defendant, we will also briefly address the issues related to the operation of the indemnification clause, the applicability of garnishment to plaintiff's claim, and the validity of the assignment plaintiff obtained.

II. The Contract

Defendant first argues that the oral agreement between Wayne Bowling and Lawn Works did not include all of the terms of the precursor written contract, and that the trial court clearly

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move to amend her complaint to add the assignment from Shelton until opening arguments on the first day of trial. The trial judge nonetheless allowed the amendment to the complaint at that time.

erred in finding that the indemnity provision was therefore still in effect after the written contract expired.

"Findings of fact by the trial court may not be set aside unless clearly erroneous." MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Here, we find there is no error, let alone clear error.

The trial court stated, at the close of the proofs at trial: "The Court is of the opinion that based upon all of the testimony that it has heard, that the contract was in fact extended with all of its provisions until the 1998 snow season ended." Upon review of the record, there is no evidence to support a definite and firm conviction that this finding was clear error.

In any case, the issue may more easily be resolved by reference to Wayne Bowling's own admissions in prior pleadings. Wayne Bowling made an admission in a prior pleading that the December 3, 1996 contract was in effect at the time of plaintiff's fall, and Wayne Bowling is bound by that admission. Lola Melbourne alleged in her First Amended Complaint that "at all times relevant hereto, Lawn Works, [sic] was contracted by Wayne Bowling to provide the winter maintenance of the parking lot owned by Wayne Bowling." In its Answer, Wayne Bowling admitted "Wayne Bowling and Lawn Works entered into a 'snow plowing contract' dated December 3, 1996." This admission is dispositive of the issue of which contract terms control. The trial court did not err in finding that Wayne Bowling had a contractual obligation to indemnify Lawn Works at the time of Melbourne's fall.

III. Double Recovery

Defendant next argues that in Michigan, a plaintiff may not double recover for the same injury; a prior award must be deducted from a subsequent award if for an identical injury. *Grace v Grace*, 253 Mich App 357; 655 NW2d 595 (2003).

We note first that plaintiff's claim for damages, at the time of the arbitration hearing, exceeded 1.6 million dollars in combined economic and non-economic damages. Given that, we would find a question as to whether the two damage awards are indeed duplicative, but we need not explore that question for the following reasons.

While defendant is clearly correct that double recovery is in general not allowed,[4] we agree with the trial court that the stipulation signed by defense counsel is dispositive of this issue. Defendant stipulated, in an order entered by the court on September 7, 2001:

[4] *Great Northern Packaging, Inc v General Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986).

> [S]hould a default judgment be entered against Brian Shelton, Lawn Works, and/or Brian Shelton d/b/a Lawn Works, then Wayne Bowling & Recreation, Inc., shall not be entitled to a set-off of said default judgment, from any verdict, judgment, or settlement against Wayne Bowling & Recreation, Inc., in this matter.

In addition, in the arbitration between Wayne Bowling and Melbourne, counsel for both parties read the arbitration agreement into the record on October 22, 2001. That agreement included this provision:

> This arbitration agreement, the arbitration, the dismissal and the satisfaction of arbitration shall not in any fashion affect or limit Plaintiff's rights to collect the previously entered judgment against Lawnworks [sic], which was formerly a defendant in this matter.

Wayne Bowling is therefore precluded from arguing that the judgment against Lawn Works must be set-off against the amount already paid by Wayne Bowling as a result of the arbitration judgment; defendant cannot now argue that plaintiff cannot double recover for the same damages.

As to defendant's argument that the economic damages were calculated incorrectly, we note that these factual findings were not challenged in the court below; the damages were determined on September 7, 2001 (default judgment) and February 12, 2002 (arbitration award). This unpreserved claim of error is not properly appealable now before this Court, and our discretionary review is limited to clear error apparent on the record. Upon review of the record, it appears that while the income figures were not adjusted for present value, neither were they adjusted for inflation, which could serve as offsetting adjustments. We note also that at the time the default judgment was rendered, there was no request or argument for either adjustment. We find no clear error.

IV. Operation of Indemnification Clause

Defendant argues that Lawn Works is not entitled to indemnification for several reasons: Lawn Works neither tendered the defense to Wayne Bowling nor did anything at all to defend the claim, but rather allowed a default judgment to enter; Lawn Works did not enter into a "reasonable settlement"; Lawn Works has not paid anything on the judgment and therefore has suffered no loss.

Defendant argues that tender is the essential first step to trigger the right of indemnity, and that absent tender, the right is forfeit. Because failure to tender precludes the indemnitor from defending claim, the indemnitor should not be bound by a default judgment against the indemnitee.[5]

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[5] Defendant cites *Ford v Clark Equipment Company*, 87 Mich App 270, 277; 274 NW2d 33 (1978), for this proposition.

In the hearing on Wayne Bowling's motion for summary disposition, the trial court noted both that the indemnification clause in the contract did not include a notice-of-suit provision, and that in any case Wayne Bowling did have notice of the claim against Lawn Works. As the trial court stated, notice to an indemnitor is not required where the indemnitor is a party to the action. *Detroit v Grant*, 135 Mich 626, 629; 98 NW 405 (1904). The trial court also correctly noted that the cases relied on by Wayne Bowling for the argument that tender is required to invoke the right to indemnity are factually distinguishable, as they involve insurance contracts, rather than contractual indemnity outside the insurance context.

At the close of the trial, the trial court briefly re-addressed the issue of tender, stating:

> [T]he court is ever mindful of the fact that there would've been no necessity for Lawn Works to do anything had they been – had they not been named a third party at fault. That's what brought them into the case in the first place.
>
> Both sides were very familiar with the contract, and if the indemnity provision is in fact in effect, then Wayne Bowl was equally as aware of that as Mr. Shelton and Lawn Works would've been.
>
> That being the situation, Lawn Works didn't have to tender any defense.

Tender is a means of ensuring proper notice to the indemnitor. *Farmer v Christensen*, 229 Mich App 417, 429; 581 NW2d 807 (1998) ("[A]n indemnitor's due process interests would be adversely affected if it were bound by its indemnitee's unilateral acts without providing notice and an opportunity to be heard.") Here, the indemnitor had such notice, having essentially brought the indemnitee into the litigation by naming it as a non-party at fault. We find that on these facts, tender was not required to trigger Wayne Bowling's obligation to indemnify Lawn Works.

Defendant also argues that an indemnitee is bound to make a "reasonable settlement," if the indemnitor is to be bound to pay, citing *Clark Equipment Company, supra*. Here, however, Lawn Works did not actually make a settlement; rather, Lawn Works did nothing at all.

The reasoning underlying the reasonable settlement rule is that an indemnitee should not be able to bind an indemnitor to a settlement that exceeds the value of a claim, but the facts of this case present no such danger. Wayne Bowling was aware that Lawn Works had taken no steps to defend the claim, and could have intervened at any time before the default judgment entered to clarify its obligations. Wayne Bowling was served with a motion for entry of default judgment against Lawn Works, which motion included a copy of the damages claimed. The circumstances that merit requiring a reasonable settlement are simply not present here.

Defendant further argues that because Lawn Works has not paid anything on the default judgment, it has suffered no loss, and therefore is not entitled to indemnification. Defendant reiterates an argument, premised on the Insurance Code, which defendant raised before the trial court. The trial court summarily rejected that argument for the reason that the term "insurer" as defined in the Code at MCL 500.106, does not cover defendant Wayne Bowling, and the Insurance Code therefore does not apply to Wayne Bowling. We agree.

The only authority cited by defendant, *Leiberman v Solomon*, 24 Mich App 495, 502; 180 NW2d 324 (1970), states in dicta that "an indemnitee cannot recover on the agreement in the absence of proof of actual damages." However, in addition to being dicta, this statement is actually a quotation from a much earlier case, *Richards v F C Matthews & Co*, 256 Mich 159, 164; 239 NW 381 (1931), which the *Leiberman* Court goes on to distinguish. In *Richards*, the Court noted that plaintiff had failed to provide sufficient evidence of a business loss where an oral promise for indemnification ancillary to a written contract was at issue, and held that it would not overturn the trial court's judgment in favor of defendant. The present case is plainly factually distinguishable.

Here, the plain language of the contract holds Wayne Bowling accountable for any "liability . . . which the contractor may accrue." Because the contract provides for indemnity when liability accrues, rather than when actual loss or damages are suffered, Lawn Works need not have suffered actual loss to trigger the indemnity obligation. *Sherman v Spalding*, 132 Mich 249, 251; 93 NW613 (1903). See also *Black's Law Dictionary,* 5th Ed. at 692 (defining "indemnity against liability" as an obligation "irrespective of whether person indemnified has suffered actual loss.")

Although the indemnitee has not paid the judgment, Wayne Bowling is still obligated to indemnify; to hold otherwise would preclude any recovery where, as here, the indemnitee is insolvent. The plain language of the contract does not require an actual loss; Wayne Bowling therefore acquired the obligation to pay when the judgment entered against Lawn Works.

V. Garnishment

Defendant next argues that garnishment is not an appropriate means of collecting an indemnity obligation. Because a statute and a court rule specifically address garnishment, this issue is a question of law subject to de novo review. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

Garnishment clearly applies to obligations.[6] However, defendant argues that an indemnity obligation does not meet any of the definitions of assets subject to garnishment in the garnishment rule, MCR 3.101(G)(1)(a) - (i).

MCR 3.101(G)(1) states: "Subject to the provisions of the garnishment statute and any setoff permitted by law or these rules, the garnishee is liable for . . . (d) all debts, whether or not due, owing by the garnishee to the defendant when the writ is served on the garnishee."

The indemnification clause states: "Customer agrees to defend and hold contractor harmless from any and all liability, including attorney fees, which the contractor may accrue

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[6] Per MCL 600.4011, ". . . the court has power by garnishment to apply the following property or obligation, or both, to the satisfaction of a claim evidenced by contract, judgment of this state, or foreign judgment . . .." MCR 3.101(B)(2) reiterates that garnishment may apply to property or to obligations.

resulting from the contractor's work on the customers [sic] property." When the default judgment entered against Lawn Works, liability clearly accrued in a specific amount, triggering this indemnity clause and thereby creating Wayne Bowling's obligation to pay. The obligation to pay is a debt.[7] We find that this debt falls within the parameters set by MCR 3.101(G)(1), and that garnishment is therefore an appropriate means of enforcing this indemnity obligation.

VI. Validity of Assignment

Defendant finally argues that plaintiff failed to obtain a valid assignment before filing her claim as assignee of Lawn Works. Defendant asserts that Melbourne obtained an assignment from Scott on January 28, 2003, eight years after he ceased involvement with the Lawn Works business entity; on January 12, 2004, nine months after filing the claim, Melbourne obtained an assignment from Shelton, owner of Lawn Works.

Here, although Scott had effectively walked away from the business during the week following the filing of the Certificate of Assumed Name[8] by Scott and Shelton, Scott never took any affirmative step to remove his name from the business documents. We find that he was therefore still bound as a partner, and the assignment he signed was valid.

Because the assignment from Scott was a valid assignment of Lawn Works' rights, the trial court was well within its discretion in amending the complaint to add the assignment from Shelton. Although this amendment to the complaint was allowed at the start of the trial, we cannot see any prejudice to Wayne Bowling in allowing it, since the assignment had been obtained more than a year before trial, and both partners in Lawn Works were deposed.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

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[7] "The word 'debt' is itself commonly understood to mean 'something that is owed or that one is bound to pay to or perform for another' or 'a liability or obligation to pay or render something.'" *Shinkle v Shinkle*, 255 Mich App 221, 227; 663 NW2d 481 (2002) (citation omitted).

[8] The Certificate form states clearly that the Certificate of Assumed Name expires five years after it is filed with the County Clerk; neither party was therefore legally able to act as Lawn Works after December 7, 1999.